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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR JIMENEZ CEJA, Defendant and Appellant.	F043252 (Super. Ct. No. 94667) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Salvador Jimenez Ceja of conspiracy to manufacture methamphetamine (Pen. Code, § 182, subd. (a)(1);[1] Health & Saf. Code, § 11379.6) and

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

child endangerment (§ 273a, subd. (a)). Both related to the operation of a methamphetamine lab on the property on which Ceja resided with Hector Munoz. The jury also found true an enhancement for a prior conviction pursuant to Health and Safety Code section 11370.2, subdivision (b).

Living on the property with Ceja were Martha Ortega, Ortega's three children, Munoz's wife, Amparo Munoz, and the Munoz children. Ceja is the father of Ortega's youngest child.

The jury also convicted Ceja of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and being under the influence of methamphetamine (Health & Saf. Code, § 11550, subdivision (a)) in an unrelated incident.

Ceja challenges the convictions, arguing the conspiracy and child endangerment convictions are not supported by substantial evidence, and the jury instructions for the conspiracy count were incomplete. Ceja also argues the sentence for being under the influence should have been stayed pursuant to section 654. Finally, Ceja points out that the abstract of judgment erroneously identifies the enhancement that was found true.

We disagree with his contentions and affirm the convictions. We agree the sentence for being under the influence of methamphetamine should be stayed pursuant to section 654. We will remand to the trial court to correct the abstract of judgment to reflect the stay and to correct the error in identifying the enhancement.

FACTUAL AND PROCEDURAL SUMMARY

The evidence presented at trial convincingly established that a methamphetamine lab was operating on the property on which Ceja and Munoz resided (the property). Police officers and criminalists testified that all the necessary equipment and many of the ingredients necessary to produce methamphetamine were found on the property. In addition, over 40 gallons of liquid and 10 pounds of solid substance associated with the production of methamphetamine were found on the property. It was estimated that the

street value of the methamphetamine in production, had production been completed, was almost $7 million.

Ceja and Munoz did not dispute these facts but instead tried to distance themselves from the lab. Ceja claimed he was a guest on the property, stayed there only part time, and did not have any connection with, or control over, anything that occurred on the property. Munoz claimed he was forced to permit the lab on the property by some unknown Mexican men who threatened him with guns.

Ceja and Munoz were charged as follows: Count 1, conspiracy to manufacture methamphetamine (§ 182, subd. (a)(1); Health & Saf. Code, § 11379.6, subd. (a); count 2, manufacture of methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)); count 3, permitting production of methamphetamine on property controlled by the defendants (Health & Saf. Code, § 11366.5, subd. (a)); and count 4, felony child endangerment (§ 273a, subd. (a)). Count 1 also alleged that Ceja had a prior drug conviction pursuant to Health and Safety Code section 11370.2, subdivision (b), and that substances containing methamphetamine were found to exceed 25 gallons of liquid by volume and 10 pounds of solid substance by weight, within the meaning of Health and Safety Code section 11379.8, subdivision (a)(3). Count 2 alleged the same two enhancements and added an enhancement for producing methamphetamine in a structure where a child was present, pursuant to Health and Safety Code section 11379.7, subdivision (a).[2]

Counts 5 and 6 pertained only to Ceja and related to the circumstances of his arrest. Ceja was charged in count 5 with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and in count 6 with being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)).

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[2] Munoz's wife, Amparo Munoz, also was charged in counts 1-4. The trial court granted her motion to dismiss at the close of the prosecution's case.

The jury found Ceja guilty on count 1, conspiracy to manufacture methamphetamine; count 4, child endangerment; count 5, possession of methamphetamine; and count 6, being under the influence of methamphetamine. The weight enhancement on count 1 was found not to be true. The jury found Ceja not guilty on count 2, manufacturing methamphetamine, and count 3, permitting a lab on the property. Ceja admitted a prior conviction for possession for sale of narcotics. He was sentenced to the midterm of five years on count 1, enhanced by three years because of the prior narcotics conviction, a consecutive term of 16 months on count 4, a consecutive eight months on count 5, and a concurrent term of six months on count 6, for a total term of 10 years.

DISCUSSION

I. Sufficiency of the Evidence

Ceja begins his attack on the judgment by arguing there was insufficient evidence to support the conviction for conspiracy and child endangerment. Our review of the sufficiency of the evidence is deferential. We "'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We will not substitute our evaluations of a witness's credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

"The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] 'Although it is the duty of the jury to acquit a

defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]' [Citation.] '"Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt."' [Citation.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

A. Conspiracy

Ceja was convicted in count 1 of conspiring with Munoz and others to manufacture methamphetamine. He argues there was no evidence that he entered into an agreement with Munoz, or anyone, and that there was no evidence that he had any control over the property.

> "Pursuant to section 182, subdivision (a)(1), a conspiracy consists of two or more persons conspiring to commit any crime. A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy. [Citations.] [¶] … [¶]
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> """'In contemplation of law the act of one [conspirator] is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences ….'"" [Citations.] Thus, '[i]t is not necessary that a party to a conspiracy shall be present and personally participate with his co-conspirators in all or in any of the overt acts.' [Citation.]" (*People v. Morante* (1999) 20 Cal.4th 403, 416-417, fns. omitted.)

There is substantial evidence of a conspiracy. The undisputed testimony is that up to eight individuals participated in the manufacturing process. These eight individuals

must have agreed to manufacture methamphetamine, thus establishing a conspiracy. The issue in this case is whether Ceja participated in the conspiracy.

"To sustain a conviction for conspiracy the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of the offense. [Citation.] In proving a conspiracy, however, it is not necessary to demonstrate that the parties met and actually agreed to undertake the unlawful act or that they had previously arranged a detailed plan. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citation.]" (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) "While 'mere association' cannot establish a conspiracy, '[w]here there is some evidence of participation or interest in the commission of the offense, it, when taken with evidence of association, may support an inference of a conspiracy to commit the offense.' [Citation.]" (*Id*. at p. 1400.)

Ceja argues there was no evidence that he agreed with any coconspirator, possessed items for the manufacture of methamphetamine, or allowed other coconspirators to use the property. This argument, of course, misconstrues the law related to conspiracy. We repeat, the evidence clearly established a conspiracy. Someone agreed to manufacture methamphetamine, someone possessed items for the manufacture of methamphetamine, and someone allowed the property to be used for the production of methamphetamine. Whether Ceja actually possessed the items to manufacture methamphetamine, or permitted the property to be used for that purpose, is immaterial. As long as one coconspirator did these things, all members of the conspiracy are responsible for the acts. (*People v. Morante, supra,* 20 Cal.4th at p. 417.)

So we return to the issue -- was Ceja a participant in the conspiracy, i.e., a coconspirator? Ceja is correct -- there was no direct evidence that he reached an

agreement with anyone to manufacture methamphetamine. But such evidence is unnecessary. Conspiracy may be proved through circumstantial evidence and inferred from the conduct of the parties. (*People v. Prevost, supra,* 60 Cal.App.4th at p. 1399.)

Ortega testified at trial that she argued with Munoz about the odors emanating from the bus. When she tried to approach the shop, Munoz stopped her. Detective Anthony Benitez testified, however, that Ortega said in an interview that Munoz *and Ceja* stopped her from approaching the shed. While Ortega testified that she seldom saw Ceja and Munoz together, Benitez testified that Ortega stated in the interview that Ceja and Munoz spent a lot of time together and Ceja would go with Munoz wherever he went.

There was additional evidence of Ceja's participation in the conspiracy. Ortega and Amparo Munoz are sisters. Ceja is the father of Ortega's youngest child and had been with Ortega for approximately eight years. Ceja testified that he barely knew Munoz, and then only through Ortega. Ortega testified that she had been staying with the Munoz family for about two months before the arrests were made. Despite his lack of relationship with the Munoz family, Ceja admitted he began staying with Munoz about one month before Ortega moved into the house.

Finally, the People presented evidence that Ceja's fingerprint was found on a beer bottle near the shop and, when Ceja was arrested, he stated he was trying to avoid the police. Ceja also admitted he was a regular methamphetamine user but did not have any source of income.

Taken in a light most favorable to the judgment, the evidence established (1) a high volume methamphetamine lab was on the property; (2) Ceja had been there while the lab was in operation; (3) Ceja was good friends with Munoz, who permitted the lab to operate on the property; and (4) Ceja prevented Ortega from going to the shed where the methamphetamine was being produced. While this is not direct evidence that Ceja entered into an agreement with Munoz and others to manufacture methamphetamine, it is

circumstantial evidence from which the jury could infer Ceja's participation in the conspiracy. In other words, it is evidence substantial enough to support the judgment.

B. Child endangerment

Ceja also attacks the child endangerment conviction as unsupported by substantial evidence.

Section 273a, subdivision (a) criminalizes four types of conduct as child abuse or endangerment. First, a violation occurs if a person willfully causes or permits a child to suffer unjustifiable pain or suffering in circumstances or conditions likely to produce great bodily harm or death. Second, a violation occurs if one inflicts unjustifiable physical pain or mental suffering on a child. Third, a violation occurs if one having the care or custody of a child willfully causes or permits the person or health of the child to be injured. Fourth, a violation occurs if one having the care or custody of a child willfully causes or permits the child to be placed in a situation where his or her person or health is endangered. (§ 273a, subd. (a); *People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) Since there was no evidence that any child was injured, Ceja was subject to conviction only if he had care or custody of a child and willfully caused or permitted the child to be placed in a situation where his or her person or health was endangered.

Three of the four violations refer to willfully causing or permitting a child to be injured or placed in a situation where the child is likely to be injured. The term "willfully," as used in section 273a, includes criminally negligent conduct. (*People v. Valdez* (2002) 27 Cal.4th 778, 787-788.) "Criminal negligence is '"aggravated, culpable, gross, or reckless ... conduct ... [that is] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life ...."' [Citation.] 'Under the criminal negligence standard, knowledge of the risk is determined by an objective test: "[I]f a reasonable person in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness."' [Citations.] Under section

20, criminal negligence 'may be sufficient to make an act a criminal offense, without a criminal intent.' [Citation.]" (*Id*. at p. 783.)

"Violations of section 273a, subdivision (a) can occur in a wide variety of situations. [Citation.] 'The number and kind of situations where a child's life or health may be imperiled are infinite.… Thus, reasonably construed, the statute condemned the intentional placing of a child, or permitting him or her to be placed, in a situation in which serious physical danger or health hazard to the child is reasonably foreseeable.' [Citation.]" (*People v. Hansen* (1997) 59 Cal.App.4th 473, 479.)

Ceja admits he was living with Ortega and their three-year-old daughter on the property and that a methamphetamine lab was operated on the site. He also acknowledges that methamphetamine labs are dangerous. Ceja argues there was insufficient evidence that he knew methamphetamine was being manufactured on the property. He points out that he was acquitted of manufacturing methamphetamine and claims there was no evidence that he knew illegal activities were occurring on the property. Ceja argues the mere presence of his family on the property was insufficient to support the verdict.

Ceja also contends there was no evidence that his daughter was allowed access to the area where the methamphetamine was being manufactured. Thus, according to Ceja, there was no evidence that his daughter was ever in any danger.

The evidence refutes Ceja's arguments. Ceja was convicted of conspiracy to manufacture methamphetamine, thus establishing that the jury concluded that he knew methamphetamine was being manufactured on the property. There also was evidence that Ceja prevented Ortega from going to the area where methamphetamine was being produced. Again, this suggests that Ceja knew what was happening on the property. The jury also could have rejected Ceja's assertion that he thought the odors associated with methamphetamine production were related to the storage of dead chickens by a nearby

farmer. This evidence is substantial enough to establish that Ceja knew methamphetamine was being manufactured on the property.

Ortega testified that the children generally were not permitted to play in the shop area where the methamphetamine was being produced. Ortega also testified, however, that the children were allowed to ride their bikes among the orange trees surrounding the house. This fact is significant because methamphetamine by-products, which the testimony established were dangerous, were found among the orange trees.

In addition to the potential exposure to the chemicals, every child on the property was placed at risk because of the potential for an explosion during the methamphetamine manufacturing process. The testimony from the experts was that, at several different stages of the production, an explosion could occur. Every child was at risk of injury if an explosion occurred.

Ortega also testified that when she looked inside the shed, one of the men shot at her, at least once, possibly twice. Thus, the men manufacturing the methamphetamine were armed and willing to shoot at people to protect their project. Again, the children were at risk of harm if they unknowingly strayed into the shed or into the path of a stray bullet while these men were attempting to protect their product. These facts establish the children were in danger, regardless of whether they played in the area where the actual manufacturing occurred.

Finally, we reject Ceja's claims that he did not know manufacturing methamphetamine was dangerous. First, we apply an objective standard, not Ceja's claimed subjective belief. (*People v. Valdez, supra,* 27 Cal.4th at p. 783.) The fact that eight strangers began working around an abandoned school bus, some of whom were armed, producing fumes that "would go right through your nose and all the way to the

back of your head,"[3] would lead an ordinary, reasonable person to believe something dangerous was happening. Ceja's admitted addiction to methamphetamine also would enlarge the pool of knowledge available to him to conclude that the odors were not from dead chickens.

This evidence is substantial enough to support the jury's verdict.

II. Jury Instructions

Ceja complains that CALJIC No. 6.10 was defective because it was incomplete. According to Ceja, a material element of any conspiracy is knowledge of the objective of the conspiracy. Ceja argues that CALJIC No. 6.10 omits this element of the crime and thus his conviction must be reversed.

The modified instruction read to the jury stated:

> "[Defendant is accused [in Count][s] 1] of having committed the crime of conspiracy to manufacture methamphetamine in violation of section 182(a)(1) of the Penal Code.]
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> "Every person who conspires with any other person or persons to commit the crime of manufacturing methamphetamine is guilty of a violation of Penal Code section 182(a)(1), a crime.
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> "A conspiracy to manufacture methamphetamine is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of manufacturing methamphetamine, followed by an overt act committed in this state by one [or more] of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.
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> "In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the information to be [an] overt act[s] and that the act found to have been committed was an overt act. It is not necessary to the guilt of any particular defendant that

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[3] This is Ortega's description of the fumes emanating from the bus.

defendant personally committed an overt act, if [he] [she] was one of the conspirators when the overt act was committed.

"The term 'overt act' means any step taken or act committed by one [or more] of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.

"To be an 'overt act', the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or an unlawful act."

"In order to prove this crime, each of the following elements must be proved: [¶] 1. Two or more persons entered into an agreement to manufacture methamphetamine; [¶] 2. [Each] [At least two] of the persons specifically intended to enter into an agreement with one or more other persons for that purpose; [¶] 3. [Each] [At least two] of the persons to the agreement had a specific intent to manufacture methamphetamine; and [¶] 4. An overt act was committed in this state by one or more of the persons [who agreed and intended to manufacture methamphetamine]."

Ceja relies on three federal cases to support his argument. In *Ingram v. United States* (1959) 360 U.S. 672, four individuals were prosecuted for various crimes related to an illegal gambling enterprise. Two of the defendants were the principles of the operation, while the other two were employees. All four were convicted of conspiracy to evade a federal tax on gambling income. The Supreme Court found insufficient evidence that the two employees conspired to avoid the taxes the employers failed to pay. "This is not a case where efforts at concealment would be reasonably explainable only in terms of motivation to evade taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted. A conspiracy, to be sure, may have multiple objectives, (citation), and if one of its objectives, even a minor one, be the evasion of federal taxes, the offense is made out, though the primary objective may be concealment of another crime. [Citation.] But the fact that payment of the federal taxes by [the employers] might have resulted in disclosure of the lottery and subsequent prosecution of [the employees] by local

authorities would permit an inference that concealment of the lottery was motivated by a purpose to evade payment of federal taxes only if, independently, there were proof that [the employees] knew of the tax liability. Evidence that [the employees] might have wanted the taxes to be evaded if they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade the taxes if they had known of them, is not evidence that they did know of them. [¶] What was said in *Direct Sales Co. v.* [*U.S.* (1943) 319 U.S. 703, 711] on behalf of a unanimous Court is of particular relevance here: [¶] 'Without the knowledge, the intent cannot exist.'" (*Ingram,* at pp. 679-680.)

In *U.S. v. Medina* (9th Cir. 1991) 940 F.2d 1247, one of the defendants, Aguilar-Correa, was convicted of conspiracy to distribute cocaine. The prosecution had evidence that Aguilar-Correa conspired with other defendants to kidnap Anthony Vela, who owed money to another defendant for cocaine. The prosecution theorized the kidnapping was to encourage Vela to pay his debt. The appellate court found sufficient evidence that Aguilar-Correa was involved with another defendant to collect money but reversed the conviction because there was no evidence that Aguilar-Correa knew this was a drug debt. "Aguilar-Correa, though perhaps guilty of *some* sort of conspiracy, was caught in an impermissible dragnet here because there is insufficient evidence that he had knowledge of the ultimate object of *this* conspiracy: to distribute cocaine. His conviction cannot stand." (*Id*. at p. 1250, fn. omitted.)

U.S. v. Krasovich (9th Cir. 1987) 819 F.2d 253 is another case where the government proved a conspiracy but failed to prove the defendant conspired to commit the crime charged. Krasovich was an employee of John and Andrea Drummond. The Drummonds were convicted of various crimes related to cocaine distribution and sales. Krasovich was aware of the Drummonds' involvement in the illegal drug trade. He agreed to purchase a used vehicle and register it in his name to avoid putting this asset in the Drummonds' name. He was convicted of conspiring with the Drummonds to avoid

income taxes. "In this case, there may well have been ample evidence that Andrea Drummond intended to use Krasovich to hide true ownership of property in order to evade income taxes. There is, however, no basis on which a reasonable jury could conclude that the defendant Krasovich had the same objective with respect to the transaction alleged in Count Eight. Nothing in the circumstances of the transaction suggests that Krasovich knew that the purpose of the concealment was to evade taxes. [¶] Andrea Drummond may have wished to conceal ownership of the truck because she wanted to use it in illegal activities, or because she wanted to avoid drawing attention to herself or her finances, or because she feared seizure of the truck under the forfeiture statute if her ownership became known. 'This is not a case where efforts at concealment would be reasonably explainable only in terms of motivation to evade taxation.' [Citation.]" (*Id*. at p. 256.)

Each of these cases involves evidence of a conspiracy to commit a crime, but the facts were insufficient to prove the defendant conspired to commit the crime on which the conviction rested. Central to each decision was whether the defendant knew of the underlying motive of the coconspirators.

This issue is not presented by the facts of this case. Ceja was convicted of conspiring to manufacture methamphetamine. There was no evidence of any other conspiracy. The cases cited by Ceja might be relevant if he had been convicted of conspiring to evade taxes from the income generated from the methamphetamine production.

Nor do the cases cited by Ceja address jury instructions. None have any possible connection to the jury instructions in this case. So we are left with the question of whether CALJIC No. 6.10 is incorrect because it does not adequately inform the jury that a defendant accused of participating in a conspiracy must know of the object of the conspiracy. We conclude there was no error in the instruction.

Ceja's argument is answered by the first sentence of CALJIC No. 6.10 -- "A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of [manufacturing methamphetamine] …." In other words, Ceja could be found guilty only if he entered into an agreement with the specific intent to manufacture methamphetamine. One cannot enter into an agreement with the specific intent to manufacture methamphetamine unless one knows the object of the conspiracy is to manufacture methamphetamine. The instruction adequately conveys to the jury the requirement that the defendant know of the object of the conspiracy.

III. Section 654

Ceja was convicted in count 5 of possession of methamphetamine and in count 6 of being under the influence of methamphetamine. He argues the sentence on count 6 should be stayed pursuant to section 654.

As pertinent here, section 654, subdivision (a) precludes multiple punishments for the same act. This section applies when a single act results in violation of multiple criminal statutes or where the defendant violates multiple criminal statutes in pursuit of one criminal objective. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The purpose of the statute is to ensure that a defendant's punishment is commensurate with his or her criminal liability. (*People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1044.)

Ceja argues that his purpose in possessing the methamphetamine was to feed his addiction and, therefore, the convictions for being under the influence of methamphetamine and possession of methamphetamine were pursuant to the same criminal objective.

The cases that have addressed the issue have concluded section 654 applies if the defendant possessed an amount of illegal substance that could be used personally in a few days. Section 654 does not apply if the defendant possessed an amount that could not be used personally within a few days.

In *People v. Holly* (1976) 62 Cal.App.3d 797, the defendant was convicted of possessing heroin and being under the influence of heroin. (Health and Saf. Code, §§ 11350 & 11550.) The trial court applied section 654 and stayed the sentence for being under the influence of heroin. (*Holly,* at p. 801.) The evidence established the defendant possessed 2.12 grams of heroin, had 22 needle marks on his arm, and was an excessive user of heroin. The appellate court concluded, "These factual determinations support the conclusion that the heroin found in defendant's pocket was possessed only for his own consumption and its use was necessary to satisfy his addiction and to his objective of being under the influence of heroin, and that defendant's possession of the heroin was incident to his objective of being under the influence; and the acts of which defendant was convicted constituted an indivisible course of conduct." (*Id.* at p. 805.)

In *People v. Maese* (1980) 105 Cal.App.3d 710, slightly different facts were presented to this court. The defendant was convicted of being under the influence of heroin, possession of heroin, and possession of narcotic paraphernalia. (*Id*. at p. 714.) There were 13.676 grams of heroin found in defendant's possession. (*Id*. at p. 715.) He was sentenced to concurrent sentences on the possession and being under the influence convictions, while the sentence for possession of narcotic paraphernalia was stayed. (*Id*. at p. 726.) The appellate court upheld his sentence. "In the cause before us it appears there were independent criminal objectives, divisible from one another. Unlike *Holly*, a substantial amount of heroin was in appellant's possession. There is no way that the total quantity could be used by appellant in a 'relatively short time.' (*People v. Holly, supra*, 62 Cal.App.3d at pp. 805-806.) [¶] Assuming appellant could use a full gram of heroin each day, it would still take at least 13 days to use the quantity he possessed. In other words, unless appellant used what would have to be lethal doses four days in succession the amount he possessed could not be used in [four days] as was possible in *Holly*. We therefore conclude that appellant was not possessing the heroin for use within a 'relatively short time.' Because the objectives are legally as well as factually divisible,

appellant may be punished for both possession of heroin and being under the influence of heroin. While in this case we need not draw the line of how much heroin may be possessed for the purpose of being under the influence, so as to prohibit simultaneous punishment for being under the influence, 13.676 grams is too much." (*Maese,* at pp. 727-728.)

In this case, Keith Copeland, a criminalist with the Department of Justice, testified that the substance obtained from Ceja contained methamphetamine and weighed .94 grams, a useable amount. The toxicologist who tested Ceja's urine sample stated that methamphetamine was present in Ceja's urine in an amount well above the minimum level to find an individual under the influence of methamphetamine. The trial court imposed a sentence consecutive to the other charges for the conviction of possession of methamphetamine and imposed a concurrent sentence for being under the influence of methamphetamine. Neither the court, the probation report, nor counsel addressed the possible application of section 654 to these two convictions.

An implicit determination that section 654 does not apply, such as we have in this case, will be upheld on appeal if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 731.) The People argue that section 654 does not apply because Ceja was found guilty of conspiracy to manufacture methamphetamine, and the quantities of partially processed material establish an independent criminal objective. This argument misses the point. Undoubtedly, the conspiracy conviction established an independent criminal objective from the possession conviction. That, however, is not the issue.

The question in this case is whether the methamphetamine that Ceja possessed at the time of his arrest was held with the purpose of furthering his addiction, or if it was held for some other independent criminal objective. The only evidence on this point is that Ceja consumed a large quantity of methamphetamine before he was arrested, and that he had less than one gram of methamphetamine in his possession when he was arrested.

There is no evidence of the rate at which Ceja consumed methamphetamine, or the rate at which the typical addict consumed methamphetamine, and thus no basis for concluding that the amount of methamphetamine possessed by Ceja would, or would not, be consumed "in a relatively short time." There is, therefore, insufficient evidence to support the trial court's implicit determination that section 654 does not apply.

IV. Abstract of Judgment

Finally, Ceja argues, and the People concede, that the abstract of judgment incorrectly states the enhancement pursuant to Health and Safety Code section 11370.2 subdivision (a). The enhancement charged, and which was found true, was pursuant to Health and Safety Code section 11370.2, subdivision (b). The trial court also must correct this error.

DISPOSITION

The judgment is affirmed. The matter is remanded to the superior court so that an amended abstract of judgment may be issued showing the sentence on count 6 is stayed pursuant to section 654 and showing that the enhancement on count 1 was imposed pursuant to Health and Safety Code section 11370.2, subdivision (b).

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CORNELL, J.

WE CONCUR:

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LEVY, Acting P.J.

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GOMES, J.